Kuantan is subject to frequent changes but is marked by buoys which are changed as necessary. DW2 was of the view that a mariner was entitled to rely on the marker buoys which is what the plaintiff did. The portion of the sand bar that he came into contact with was in the lane marked for the passage of vessels and where the depth according to the chart should have been anything from 9½ feet (without taking into account the increase as a result of river water). It was a submerged sand bar which must have been formed in the frequent changing of the sand formation. I fail to see what the plaintiff could have done to have avoided the accident apart from not venturing out at all on that day. The impression I have obtained is that in doing so there were risks but it having been a calm day, it was not unreasonable that he did venture out. I have failed to find any "want of diligence" on the part of the plaintiff that entitles the defendants to avoid the claim. The accident could have happened even to the Port Pilot simply because the position of the sand bar is not static. The argument that the plaintiff's lack of knowledge of the channels was such that his taking out the vessel rendered it unseaworthy has no merit.

There will be judgment for the plaintiff and in the sum of M$50,000. The plaintiff had by his solicitors' letter of February 14, 1978 given the defendants 3 days to pay and settle the M$50,000. Accordingly interest on the judgment sum at 8% per annum should run from February 18, 1978 until realisation and I so order. The defendants will also pay the costs of the plaintiff as taxed by the proper officer of the court.

Claimed allowed.

Solicitors: *Balendran, Chong & Bodi; Shearn Delamore & Co.*

KHAU DAW YAU v. KIN NAM REALTY DEVELOPMENT SDN. BHD.

[O.C.J. (George J.) December 1, 1982]

[Kuantan — Civil Suit No. 256 of 1978]

Contract – Contract for purchase of land – Booking applications signed – Terms and conditions of booking set out in document – Action for specific performance – Application for sub-division of land – Special condition imposed that portion of land reserved for bumiputra – Whether performance of contract has become impossible or unlawful and further performance excused – Offer made by persons not registered owners – Whether contract illegal.

Land Law – Contract for purchase of land – Portion of land reserved for bumiputra – Whether contract illegal.

In this case one Tengku Sepiah was the registered owner of a piece of land which she sold and transferred to Futo Trading Sdn. Bhd. who was to develop the land for building. Futo Trading Sdn. Bhd. made an arrangement with the defendants for the development of the land. The defendants were themselves the registered owners of another piece of land and this also was to be developed for building. The plaintiffs had made bookings in respect of lots on the land and had signed booking applications which contained the terms and conditions of booking. Application was made for subdivision of the lands but approval was given subject to a reservation of certain lots for bumiputra. The plaintiffs sued for specific performance of the sale of the lots of the land. The defendants claimed that the actions should be dismissed because (1) there was no concluded contract on which an action would lie; (2) even if there was a concluded contract, the special condition imposed made the performance of the contract impossible and/or unlawful and that therefore further performance of it was excused and (3) (in respect of some of the lands) as the defendants were not the registered owners of the land when the bookings were made, even if the bookings made by them amount to concluded contracts, such contracts were illegal by virtue of rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970.

Held: (1) the defendant's contention that there was no concluded contract fails as there was a booking document which contained the terms and conditions of the booking and the parties are deemed to have approved the printed sale and purchase agreement setting out the terms and conditions of sale;

(2) the special conditions in this case were not endorsed on the title deeds and even if they could be said to have been imposed when the approval was given, they could be said to have been withdrawn before the qualified titles were issued. Even if the special conditions were imposed and not withdrawn, the defendants cannot invoke their existence to avoid their liabilities under the contracts;

(3) the defendants should have known that in applying for conversion and subdivision the authorities could impose terms and conditions. They could have inserted an express condition that the discharge of their obligations would be dependant on the approval to be obtained from the land office but they did not do so. On the facts of the case the defendants took the risk of contracting to supply each of the purchasers with a sub-lot with a building duly erected thereon without qualification save one that the building to be erected on the sublot was subject to "approval by the local authority or authorities;

(4) in this case it was not possible to read into the contract a further qualification of an implied term that the contract need only be performed by the defendants if they ended by having all the lots for disposal. The defendants are not excused from performance;

(5) in this case the defendants by inviting the pur-

chasers to make bookings, by implication held themselves as being legally entitled to enter into the contracts for the sale of the lots with houses to be built thereon. The contract was *ex facie* lawful and the fact that it was unlawful was not known to the purchaser. The plaintiffs were never *in delicto* since they did not know the vital fact, that the vendor was in fact not the registered owner of the land, that would make the performance of the contract illegal. The defendant's attempt to avoid their liabilities on the basis of illegality therefore fails;

(6) the plaintiffs in this case are entitled to damages for breach of contract.

Cases referred to:

(1) *Chillingworth* v. *Esche* [1924] 1 Ch. 97.
(2) *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck* [1981] 1 M.L.J. 56.
(3) *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* [1951] 1 K.B. 190, on appeal to House of Lords see [1952] A.C. 166.
(4) *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* [1952] A.C. 166 @ 183.
(5) *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524, 528, 529.
(6) *Krell* v. *Henry* [1903] 2 K.B. 740.
(7) *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* [1931] 1 Ch. 274.
(8) *Baily* v. *De Crespigny* L.R. 4 Q.B. 180.
(9) *Barrows* v. *Rhodes & Anor.* [1899] 1 Q.B. 816, 828.
(10) *Archbolds Ltd* v. *Spanglett* [1961] 1 Q.B. 374.
(11) *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, 293.
(12) *Waugh* v. *Morris* (1873) L.R. 8 Q.B. 202, 208.
(13) *Anderson Ltd.* v. *Daniel* [1924] 1 K.B. 138.
(14) *St. John Shipping Corporation* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267, 283.
(15) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] A.C. 304; [1962] M.L.J. 152.
(16) *Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.* [1981] 2 M.L.J. 60.

CIVIL SUIT.

A. Ramanathan for the plaintiff.
K. Y. Foo for the defendants.

Cur. Adv. Vult.

George J.: In some of these actions Futo Trading Sdn. Bhd (Futo) is sole defendant, in some others Kin Nam Realty Development Sdn. Bhd. (Kin Nam) is sole defendant and in the rest of the actions both the companies are co-defendants.

Having obtained an order for consolidation of the suits, learned Counsel for the Plaintiff and for the Defendant decided that with the tender of a "Statement of Agreed Facts" and an agreed bundle of documents no other evidence need be led and obtained the court's permission for each side to put in a written submission which was eventually done.

From these documents and the pleadings in each of the actions I gather the relevant facts to be as follows:–

One Tengku Sepiah was the registered owner of the whole of the land held under EMR. 3659 for lot 948 in the Mukim of Kuala Kuantan. She sold and transferred the whole of the land to Futo who was to develop it by sub-dividing the land into smaller lots and having buildings erected on the sub-lots.

Futo who was not a licensed housing developer arrived at an arrangement with Kin Nam who was one, under the terms of which arrangement lot 948 was to be converted in respect of user from agricultural to building and sub-divided into 28 sub-lots on which buildings were to be erected of which 4 sub-lots with semi-detached houses were to be retransferred to Tengku Sepiah leaving the other 24 lots for disposal by sale.

Kin Nam were themselves the registered owners of another lot of land known as lot 953 held under EMR. No. 530. This lot was also to be developed by conversion from agricultural to building, sub-divided and buildings erected on the sub-divided lots. It was apparently expected that 32 sub-lots would be obtained by the sub-division.

The applications for conversion and sub-division of both lots 953 and 948 were made to the relevant Land Office and while these applications were pending the general public were invited to make bookings for the purchase of the sub-lots with buildings to be erected thereon. All the sub-lots were taken up by persons who were non-Bumiputra and sometime thereafter Kin Nam was notified by the Land Office that its applications were approved, lot 948 to have 28 sub-lots and lot 953, 32 sub-lots, but subject to certain conditions three of which were under the heading "Syarat-syarat tertentu" and one under the heading "Syarat-syarat khas" which I understand to mean "Special conditions", the special conditions in respect of lot 953 being:

"Sekurang-kurang 7 buah bangunan terres dan 3 buah bangunan berbandong daripada bangunan-bangunan yang hendak didirikan itu hendaklah dikhaskan kepada Lembaga Kemajuan Negeri Pahang sebagai Wakil kepada bumiputra. Sesiapa yang berkehendakkan bangunan-bangunan itu

bolehlah membuat permohonan kepada Lembaga Kemajuan Negeri."

which I understand to mean "at least 7 terrace and 3 semi-detached houses from the buildings that are to be erected shall be reserved for the Lembaga Kemajuan Negeri Pahang as representatives of members of the public who are Bumiputra who may apply to the agency for the purchase of such houses."

In respect of lot 948 the syarat-syarat khas was:

"Sekurang-kurangnya 30% daripada bangunan yang hendak didirikan itu hendaklah dikhaskan kepada Lembaga Kemajuan Negeri Pahang sebagai wakil kepada bumiputra. Sesiapa yang berkehendakkan rumah/bangunan bolehlah membuat permohonan kepada Lembaga Kemajuan Negeri,"

that is to say that 30% of the buildings that are to be erected should be reserved for Bumiputra.

I have not been told whether the applicants took issue with the approving authority in respect of the imposition of these conditions or any of them. But it is curious (and perhaps significant) that when the documents of title in respect of the sub-lots were issued the three said specific conditions were endorsed on the issue document of title but the special condition was not.

The Defendants took the stand that they were obliged to adhere to the special condition that had been imposed when the approval for conversion and sub-division was given which meant that they could not complete the sale to some 30% of those persons who had made bookings for the purchase of lots in that all of those who had made bookings were non-Bumiputra. Apparently Futo had suggested that the solution would be for there to be a ballotting for the available lots but that solution was not acceptable to all the purchasers.

The Plaintiffs in each of these eight actions are persons who had made bookings. Each of them has been at all relevant times ready willing and able to complete the sale. The Defendants and each of them have been at all relevant times ready and willing to call off the sale and refund the $500 deposit that had been made when each booking was effected. One factor that must have influenced both vendors and purchasers was that there had been significant appreciation of the value of the lots.

The Plaintiffs and each of them have by these actions sued for specific performance of what is contended to be a concluded contract for the sale of the lot of land booked by them with a completed house built thereon, for damages and for any other relief that may be due to them.

The Defendants say that each of the actions should be dismissed because:

(1) There was no concluded contract on which an action would lie.

(2) Even if there was a concluded contract, the special condition imposed made the performance of the contract impossible and/or unlawful and that thereby the further performance of it was excused. and

(3) As to Civil Suits Nos. 274, 257 and 259 as Kin Nam were not the registered owners of the land when the bookings were made, even if the bookings accepted by them amount to concluded contracts such contrancts were illegal by virtue of Rule 11(1) of the Housing Developers (Control and Licensing) Rules 1970.

As to whether there was a concluded contract on which an action for breach thereof would lie reference has to be made to the document known as the "Booking applications" that exists in each of the cases one of which is exhibit AB_1. This document can be said to be in two parts, the first being the application by the intending purchaser "to Kin Nam Realty Development Sdn. Bhd." "for the purchase of" (then comes a description of the land, area of the sub-lot, the total purchase price with a provision for payment for any excess area at $1/- a square foot). There is a reference to the type of house involved, "Lucky Garden Terrace Single Storey," followed by provisions for the terms of payment "In accordance with the agreement to be executed in due course". The Booking Fee is stated to be $500. The first part of the documents ends with the signature of the applicant on the right side of the document and on the left side of the document are the words, "Accepted by: Kin Nam Realty Development Sdn. Bhd." followed by the signature of some agent of the company presumably authorised to "accept".

In the second part of the document are further terms and conditions expressly stated to be binding on both parties. I reproduce those terms and conditions:

"*Terms and Conditions of Booking:*

The parties hereto agree as follows:–

1. The applicant shall be registered as the purchaser.
2. The applicant shall not transfer, sell or assign the said lot to any other person without the prior consent of the Developer.
3. The applicant is deemed to have inspected and accepted the proposed plan of the house and the specifications and the siting of the said lot and approved the printed Sale and Purchase Agreement setting out the terms and conditions of sale.
4. The applicant shall when called upon by the Developer or their Solicitors within 14 days thereof execute the Sale and Purchase Agreement to be prepared by the said Solicitors AND IT IS HEREBY EXPRESSLY AGREED that in the event of the applicant failing to execute the agreement as aforesaid, the booking fee paid to the Developer shall be forfeited as agreed liquidated damages and this booking shall be rendered null and void.
5. All legal fees and stamp duties, incidental to the preparation of the Sale and Purchase Agreement and the subsequent transfer of the said lot shall be borne and paid by the applicant.
6. It is expressly understood that this booking is accepted subject to contract being executed in good time.
7. The said building is subject to approval by local authority or authorities."

To my mind, Clauses 1 and 2 regard the applicant not as a potential purchaser but one who has by the acceptance of his application become the purchaser of the sub-lot. Clearly what was accepted was the application "to purchase" the sub-lot.

Clause 3 has the effect of an estoppel against the applicant complaining that he had no knowledge of the specifications of the house to be built or of the specifications and siting of the lot or of the terms and conditions of the sale and purchase agreement to be executed at a later stage.

Encik K.Y. Foo for the Defendants has argued that the words "subject to contract" in Clause 6 has the effect that there would be a concluded contract only after a formal contract is entered into by the parties. He cited a passage from the judgment in *Chillingworth* v. *Esche*[1] which ends with the sentence, "But they (i.e. the words "subject to contract") are words appropriate for introducing a condition, and it would require a very strong and exceptional case for this clear prima facie to be displaced." But an earlier sentence in that passage reads, "I do not say that the phrase makes the contract containing it necessarily and whatever the context a conditional contract."

Clause 6 in fact does not leave it at "the booking is accepted subject to contract" but takes it further as emphasised by me, viz: "the booking is accepted subject to contract *being executed in good time.*" The words "Subject to contract" should be read in their context and thus read has an effect very different from the effect Encik Foo would like me to give to them. The effect is that when called upon to do so, the sale and purchase agreement should be executed by the purchaser without delay. The need for expediency is given in the earlier Clause 4, and Clause 6 gives emphasis to it.

The facts in *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck*[2] are so similar to the position obtaining in the instant case in respect of the submission that there was no concluded contract, that I need do no better than to simply apply the ratio in that judgment of the Privy Council and hold that the Defendants' contention that there was no concluded contract fails. If anything the position here is even more favourable for holding that there was a concluded contract in that unlike in *Daiman*, the parties in the instant case are deemed to have "approved the printed sale and purchase agreement setting out the terms and conditions of sale."

I now come to the question of the effect of the special condition set out by the Pemungut Hasil Tanah in giving approval to the application for conversion and sub-division. This special condition was not endorsed on the qualified titles that were eventually issued. This aspect of the defence is one of confession and avoidance. The burden of proving that there was such a special condition, that it continues to obtain and was and is binding on the Defendants, is on the Defendants. In the absence of any explanation for the omission of the special condition from the endorsement on the title deeds, I am constrained to the view that it has to be assumed that for reasons not divulged to the court, that the special condition was not after all imposed on the lands or if it can be said to have been imposed when the approval was first given, it was withdrawn before the qualified titles were issued. On that view the contention of the Defendants that it was impossible or illegal to perform their obligations under the contract fails.

Even if I am wrong in holding that that special condition was not in fact imposed or in any event had been withdrawn, it is my view that the Defendants cannot invoke its existence to avoid their liabilities under the contract.

The Defendants should have known that in applying for conversion and sub-division the authorities could impose terms and conditions. There could not have been any guarantee that their applications would be approved on the basis that they would get the 28 and 32 sub-lots respectively for lots 948 and 953. They could have inserted an express condition that the discharge of their obligations would be dependent on the approvals to be obtained from the Land Office but they did not do so. The question that then arises is whether the court should imply such a condition.

Encik Foo argues that clause 7 must be read to mean that the contract was conditional upon the local authority approving the building plan referred to in clause 3 as well as the Land Office approving the application for conversion and sub-division. I cannot agree.

In clause 3 the building plan and the specifications (and siting) of the lot are treated as two separate entities. To my mind, if a reservation was to be imposed in respect of both entities only one (the building plan) would not have been specifically picked up in formulating clause 7. If there is any ambiguity in the terms of clause 7 – I do not find any – then on the *contra proferentem* rule the reading of clause 7 should be as suggested by the Plaintiffs as opposed to the Defendants' suggested reading of it.

In fact looking at the booking application as a whole the impression I get is that the document is set out in a manner calculated to give the purchaser and anybody else reading the document the impression that there might be problems about approval of the building plan by the local authority but no other problem in respect of the development is envisaged. I am of the view that it was not in the contemplation of the parties that there would be any problems in respect of the application for conversion and sub-division when the application for booking was executed by them.

The Denning judgment in the English Court of Appeal in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[3] took the view that there had been a change of attitudes and that the courts have "the power to qualify the absolute, literal or wide terms of the contract – in order to do what is just and reasonable in the new situation ..... they will not allow the words, in which they happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract ..... The day is done when we can excuse an unforeseen injustice by saying to the sufferer 'It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a *Chalmers* ....."

The passage from the judgment of Lord Denning from which the above quotations were taken was reviewed with concern by the House of Lords and Viscount Simon having referred to the passage said,

> "With all respect to the learning and acumen of the learned Lord Justice, I do not agree that there has been a recent change as the result of which the courts now exercise a wider power in this regard than they previously used."

The Law Lord went on to say at page 185,

> "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in *Constantine's* case) or one 'which justice demands' (Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*), this result is arrived at by putting a just construction upon the contract in accordance with an 'implication ..... from the presumed common intention of the parties,' (Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*)[4]

In *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[5], *Krell* v. *Henry*[6] (one of the cases that has come to be known as the Coronation Cases) was discussed. Lord Wright (at page 528) referred to *Krell* v. *Henry*

> "..... where the contract was for the hire of a window for a particular day: it was not expressed but it was mutually understood that the hirers wanted the window in order to view the Coronation procession: when the procession was postponed by reason of the unexpected illness of

King Edward, it was held that the contract was avoided by that event: the person who was letting the window was ready and willing to place it at the hirer's disposal on the agreed date; the hirer, however, could not use it for the purpose which he desired. It was held that the contract was dissolved, because the basis of the contract was that the procession should take place as contemplated. The correctness of that decision has been questioned, for instance, by Lord Finlay L.C. in *Larrinaga* v. *Societe Franco-Americaine des Phosphates.* Lord Finlay observes: It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract.

The authority is certainly not one to be extended; it is particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so. In *Hirji Mulji* v. *Cheong Yue Steamship Co.*[1] Lord Sumner speaks of frustration as a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands. In a case such as the present it may be questioned whether the court should imply a condition resolutive of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present in their minds when they made the contract.

This was one of the grounds on which the judges of the Supreme Court were prepared to decide this case. Their Lordships do not indicate any dissent from the reasoning of the Supreme Court on this point."

In *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.*[7] shortly stated the facts were that the lessees of a hotel entered into two contracts with a firm of advertising agents under the terms of which the latter were entitled to erect and exhibit for a term of years, upon the roof of the hotel, electrically illuminated advertisements. An electric sign was duly erected. Before the expiration of the term the local authority in exercise of its statutory powers (akin to compulsory acquisition of property) took possession of the hotel and began to demolish it. By arrangement the electric sign was removed by the advertising agents who subsequently commenced an action for damages against the lessees for breach of the two contracts.

It was held that, as it could not be said that both parties to those contracts had made their bargain upon the footing that if the local authority, exercised its powers and took over the hotel the contracts were to be discharged, there must be a declaration that the defendants were liable to the Plaintiffs for damages for breach of those contracts.

In the course of his judgment (at page 282) the Master of the Rolls, Lord Hanworth referred with approval to the principle laid down in *Baily* v. *De Crespigny*[8] that is to say, that where some higher authority has supervened and has prevented the completion of the terms of an agreement such failure to perform the agreement is not to be imputed to one of the parties but is due to what has subsequently made performance impossible, with the result that the defaulting party is not to be responsible in damages to the other party. The Master of the Rolls, however, then went on to consider whether it was possible to apply that principle to the case before the court,

"Now is it possible to apply that principle to the present case? As I have said, and the learned judge has found, it would appear that the defendants were aware of the fact that their premises might be taken under the statutory powers in the Act of 1920, section 11. The plaintiffs had no such knowledge, nor can knowledge be imputed to them. But there seems to be a difficulty in saying that the parties impliedly agreed that there should be a continued existence of the St. Peter's Hotel as the basis of their contract, for the defendants must have known that while they had a sure and certain continuance of their rights until October 31, 1925 (that is for at least some ten months beyond the date when the agreement was made), there was some risk after that date. They could have provided against that risk, but they did not. The court is not very ready to imply subsidiary additions to an agreement made between parties and, in the absence of such implication, the law as stated in *Paradine* v. *Jane* still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement. If they do not do so, but have entered into a contract in terms which are absolute, those terms must be carried out unless in the somewhat rare cases where it can be found that there was an implied understanding on both sides that the basis of the contract was the continued existence of an essential matter to the contract. Having regard to the knowledge on the part of the defendants, the terms of the contract and the fact that the defendants were sure of their possessory rights for a certain time only, it does not seem to the court to be possible to apply the principles illustrated in *Baily* v. *De Crespigny* and the subsequent cases which have been referred to which arose during the war."

Romer, L.J. in agreeing with the Master of the Rolls said (at page 285),

"Now the circumstances of the present case are that the impossibility of further performance by the defendants of their contract arose from the exercise by the Corporation of compulsory powers of purchasing the hotel. Those

powers, however, had been conferred by an Act of 1920, four years before the date on which the plaintiffs and the defendants entered into the contract or contracts in question. I agree with Bennett J. and the Master of the Rolls that the defendants must have known of the existence of the Act and, therefore, of those compulsory powers. In those circumstances, I find myself quite unable to come to the conclusion that the exercise of those compulsory powers cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. It seems to me rather that the exercise of those compulsory powers was an event which might have been anticipated and guarded against in the contract."

The bookings in respect of each of the Plaintiffs were made towards the end of 1972 or in early 1973 when it was common knowledge that the "New Economic Policy" had been proclaimed and was being implemented in various areas of endeavour, if not earlier, certainly when implementation of the 2nd 5-year plan was embarked upon in 1971. In any event, any developer or potential developer must have known as pointed out earlier that approval of application for sub-division would not necessarily be in the terms as desired by the applicant. Section 136 of the National Land Code prescribes the conditions that have to be satisfied before approval for sub-division is given. For instance, section 136(c)(ii) provides that the proposed sub-division should not be contrary to any plan approved by the State Authority for the development of the area or to any decision of the planning authority for that area. In practice such applications in respect of urban areas is referred to various government agencies including the Public Works Department, the Drainage & Irrigation Department and the Town Planner for their views on the application and it is in consultation with such and other agencies that the State Government, or as the case may be, the Collector, satisfies himself that the conditions prescribed by section 136 will be satisfied. The applicant could have ended up obtaining smaller lots. He could have ended up with less lots than applied for, for example when the planning authority insists that provision be made for a playing field or that approval could only be given for bungalow lots as opposed to lots for terrace houses. It seems to me that the possibility that the applicant would end up with less than 28 and 32 sub-lots, respectively, available for sale whether because of some provision of the law or some policy decision of the Executive was something that should "have been anticipated or guarded against in the contract." (The injustice that they now say has befallen them is not an "unforeseen injustice" referred to by Lord Denning). But if that was not done and the parties had entered into a contract in terms which are absolute those terms must be carried out or damages paid for breach of contract. On the facts of the present case the Defendants took the risk of contracting to supply each of the purchasers with a sub-lot with a building duly erected thereon without qualification save one that the building to be erected on the sub-lot was subject to "approval by the local authority or authorities."

On the facts and on the principles enumerated in the cases I have referred to, I do not find myself in a position to read into the contract a further qualification of an implied term that the contract need only be performed by the Defendants if they ended up having for disposal 28 sub-lots and 32 sub-lots respectively. The Defendants are not excused from performance.

What is left for consideration is the third argument advanced by the Defendants which is restricted to civil suits 274, 257 and 259.

Rule 11 of the Housing Developers (Control and Licensing) Rules 1970 prohibits a licensed housing developer who is not the proprietor of the land upon which the housing development is carried out into entering into a contract of sale of any housing accommodation in that housing development unless the proprietor of the land is also a party to such contract of sale and agrees to the sale of the land for purposes specified in such contract of sale. Rule 17 provides for penalties to be imposed on any licensed housing developer who contravenes any of the provisions of the rules.

In respect of civil suits 274, 257 and 259 the Defendant who is a licensed housing developer seeks to avoid his liabilities under what I have found to be a concluded contract by contending that in view of Rule 11 and the fact that he was not the proprietor of the land in respect of which the bookings were accepted, the contract was one forbidden by law and therefore void and that accordingly the claim could not be maintained.

The scheme of the Housing Developers (Control and Licensing) Act 1966 and of the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.

In *Barrows* v. *Rhodes & Anor.*[9] the Plaintiffs sought to recover damages from the defendants on the ground that they had induced him by false

and fraudulent representations to take part in a military engagement in consequence of which he suffered *inter alia* personal injuries and was put to loss. The defence was that such a military engagement was prohibited by the law and the participation in the expedition constituted a criminal offence and accordingly no action for damages could be maintained. The false and fraudulent representation was that the proposed expedition had the sanction of the Government (which it did not). In his judgment Kennedy J. said (at page 828),

"It has, I think, long been settled that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom ..... Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear.

In the next place, it is, I think, also clear that an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorized or (as is alleged in this action) fraudulently induced by another to do an act indifferent in itself, which has turned out, because it constitutes a private wrong, to be unlawful, but which was not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness."

In *Archbold's* case[10], the defendants owned vans with the 'C' licences which entitled them to carry only their own goods but undertook to carry goods for the plaintiffs. The plaintiffs were not aware that the defendants did not have the necessary 'A' licence which would entitle them to carry the plaintiffs' goods. Owing to the defendants' driver's negligence, the goods, some 200 cases of whisky, were stolen. On a claim from the plaintiffs for damages for the loss of the whisky, the defendants pleaded illegality of the contract in that their vans did not have an 'A' licence. At page 384 Pearce L.J. said,

"If a contract is expressly or by necessary implication forbidden by statute, or if it is *ex facie* illegal or if both parties know that though *ex facie* legal it can only be performed by illegality or is intended to be performed illegally, the laws will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law."

The learned Lord Justice went on at page 385,

"The carriage of the plaintiffs' whisky was not as such prohibited; the statute merely regulated the means by which carriers should carry goods. Therefore this contract was not expressly forbidden by the statute ..... The Plaintiffs' part of the contract could not constitute an illegal use of the vehicle by them since they were not using the vehicle. If they were aware of the true facts they would, of course, be guilty of aiding and abetting the defendants, but they have acted in ignorance and they cannot be held guilty of any offence under the statute ..... In this case, therefore, the plaintiffs were not committing any offence ... The object of the Road and Rail Traffic Act, 1933, was not (in this connection) to interfere with the owner of goods or his facilities for transport, but to control those who provided the transport, with a view to promoting its efficiency. Transport of goods was not made illegal but the various licence holders were prohibited from encroaching on one another's territory, the intention of the Act being to provide an orderly and comprehensive service. Penalties were provided for those licence holders who went outside the bounds of their allotted spheres. These penalties apply to those using the vehicle but not to the goods owner. Though the latter could be convicted of aiding and abetting any breach, the restrictions were not aimed at him. This view is supported by common sense and convenience. If the other view were held it would have far-reaching effects. For instance, if a carrier induces me (who am in fact ignorant of any illegality) to entrust goods to him and negligently destroys them, he would only have to show that (though unknown to me) his licence had expired, or did not properly cover the transportation, or that he was uninsured, and I should then be without a remedy against him ..... This appears to me an undesirable extension of the implications of a statute."

The learned Lord Justice then went to quote from a judgment of Lord Wright in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[11]:

"Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

Pearce L.J. continued,

"If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on the public policy, to hold those contracts unenforceable which are *ex facie* unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute ..... The next question is whether this contract though not forbidden by statute was *ex facie* illegal. Must any reasonable person on hearing the terms of the contract (which presumed knowledge of the law) realise that it was illegal? There is nothing illegal in its terms. Further knowledge, namely, knowledge of the fact that Randall's van was not properly licensed, would show that it could only be performed by contravention of the statute, but that does not make the contract *ex facie* illegal.

However, if both parties had that knowledge, the contract would be unenforceable as being a contract which to their knowledge could not be carried out without a violation of the law: see per Lord Blackburn in *Waugh* v. *Morris*[12]. But where one party is ignorant of the fact that will make the performance illegal, is it established that the innocent party cannot obtain relief against the guilty party? The case has been argued with skill and care on both sides, and yet no case has been cited to us establishing the proposition that where a contract is on the face of it legal and is not forbidden by statute, but must in fact produce illegality by reason of a circumstance known to one party only, it should be held illegal so as to debar the innocent party from relief. In the absence of such a case I do not feel compelled to so unsatisfactory a conclusion, which would injure the innocent, benefit the guilty, and put a premium on deceit. Such a conclusion (in cases like this where a contract is not forbidden by statute) can only derive from public policy. For the reasons given by Lord Wright above, an extension of the law in this direction would be more harmful than beneficial. No question of moral turpitude arises here. The alleged illegality is, so far as the plaintiffs were concerned, the permitting of their goods to be carried by the wrong carrier, namely, a carrier who unknown to them was not allowed by his licence to carry that particular class of goods. The plaintiffs were never *in delicto* since they did not know the vital fact that would make the performance of the contract illegal. In my view, therefore, public policy does not constrain us to refuse our aid to the plaintiffs and they are therefore entitled to succeed. I would dismiss the appeal."

In the instant case the defendants by inviting the purchasers to make bookings, by implication held out themselves as being legally entitled to enter into contracts for the sale of the lots with houses to be built thereon. Applying the *ratio* in *Archbold's case* I find that the contract *ex facie* to be lawful and that in fact it was unlawful was not known to the purchaser. The plaintiffs were never *in delicto* since they did not know the vital fact (that the vendor was in fact not the registered owner of the land) that would make the performance of the contract illegal.

The position might very well be different if the defendants had invoked the non-adherence of the requirements to rule 12(1) of the Housing Developers (Control and Licensing) Rules 1970 and had put up a case to show that both parties had agreed to ignore the provisions of the rule and were thus *in pari delicto*. But as far as rule 11 is concerned the prohibition is directed against the housing developers alone and if the purchaser was not *in delicto*, then public policy does not constrain the court to refuse its aid to the plaintiffs.

The case of *Anderson Ltd.* v. *Daniel*[13] is said to establish the proposition that where the parties have agreed to something which is prohibited by Act of Parliament it is undisputable that the contract is unenforceable by either party. Devlin, J. (as he then was) in *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[14] referred to that case thus:

"I am satisfied that Mr. Wilmers's chief argument is based on a misconception of the principles applied in *Anderson Ltd.* v. *Daniel* which I have already cited. In order to expose that misconception I must state briefly how that principle fits in with other principles relating to illegal contracts. There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it."

Encik Foo for the Defendants had cited *Chai Sau Yin* v. *Liew Kwee Sam*[15]. Although the learned authors of Volume I of *Chitty* on Contracts, 23rd Edition at paragraph 925 have questioned that decision (with respect I think with some justification), it being a decision of the Privy Council on a Malaysian case I am bound by it. However, as was pointed out by Encik Ramanathan for the plaintiffs, *Chai Sau Yin* can be distinguished. This was done by Chua J. in the Singapore case *Mary-Ann Arrichiello* v. *Tanglin Studio Pte. Ltd.*[16]

In my view *Chai Sau Yin* is not inconsistent with the principles set out in *Barrows* v. *Rhodes*,[9] *Archbold*[10] and the other cases I have cited. In *Chai Sau Yin* the respondent who was rubber planter had been selling his rubber to a partnership. He knew that the Managing Partner one Yap had a licence to purchase rubber and had partners but took no steps to find out whether the other partners were included in the licence. The Rubber Supervision Enactment, 1937 provided, by section –

"5(i) ..... no person shall purchase ..... rubber ..... unless he shall have been duly licensed .....

16(ii) A licence is personal.

19. Every holder of a licence to purchase rubber shall cause his licence to be framed and conspicuously exhibited on his licensed premises."

One of the reasons for the requirement that the licence has to be conspicuously exhibited has to be, to demonstrate to the vendors of rubber that the purchaser has been duly licensed to purchase rubber. It can be said that in *Chai Sau Yin's case* that the vendor must have been deemed to have known that only Yap was licensed to

purchase rubber and when inspite of that the vendor proceeded to sell rubber to the partnership he could be said to be *delicto.* In *Archbold's* case the point was made "that the Plaintiffs did not know that the vehicle on which the goods were placed for carriage held only a 'C' licence, *nor did they deliberately shut their eyes to the matter.*" (The emphasis is mine).

In my judgment the defendants' attempt to avoid their liabilities on the basis of illegality also fails.

Accordingly the Plaintiffs in each of the actions are entitled to specific performance, alternatively to an award for damages.

Now one of the conditions imposed in the issue document of titles is that the buildings to be built on the lots should be built within two years of the imposition of the condition. Nothing having been done to the land all these years I can see various difficulties in the Defendants completing the development of the sub-lots. In all the circumstances the justice of the case calls for an order that the Defendant in each of the cases pays the respective Plaintiffs damages to be assessed after I hear evidence and argument in respect thereof.

There will be an order in those terms. The Plaintiff in each case will also be entitled to the costs of this action. The question of interest will be decided after I hear further argument.

Order accordingly.

Solicitors: *H.Y. Lee & Hee; K.Y. Foo & Co.*

RETHNASAMY v. TEOH NGOO MOOI & ANOR.

[A.C.J. (Edgar Joseph Jr. J.) December 2 & 6, 1982]

[Penang – Civil Appeal No. 33 of 1979]

Landlord and Tenant – Claim for possession – House built on land belonging to landlord – Ownership of house – Admission of oral evidence as to contents of written tenancy agreement – Whether tenancy determined on death of former landlord – Equitable estoppel – Whether notice to quit effective to terminate tenancy.

This was an appeal from the decision of the learned magistrate who had given vacant possession of the land on which stood a house to the respondents. The appellant had originally rented the land from one Veerappen, since deceased, and he had built the dwelling house on the land with the consent of Veerappen. The appellants who had also occupied part of the land, had bought the whole of the land from Veerappan. The respondents issued a notice to quit dated May 14, 1974 requiring the appellant to vacate the land on or before May 30, 1974. The statement of claim alleged that there was an agreement in writing between Veerappen and one Subramaniam, the brother of the appellant, whereby the land was leased for three years. At the end of this period the appellant who was living with Subramaniam refused to quit the premises. In his defence the appellant contended that the previous landowner had told him he could stay on the land forever if he paid the rent. He stated he had expended various sums in erecting and maintaining the house and he further pleaded that his tenancy had not been duly determined. At the trial before the learned magistrate oral evidence was allowed to be given of the alleged written agreement. The learned magistrate *inter alia* held that as the previous landlord had died the lease agreement and whatever interest or right created was duly determined.

Held: (1) the learned magistrate should not have permitted the respondents to lead oral evidence as to the contents of the written tenancy agreement;

(2) the learned magistrate was wrong in holding that upon the death of Veerappen, the lease had been determined;

(3) the learned magistrate should have considered whether his claim that he was allowed to stay on the land forever raised a protection in equity;

(4) the notice given by the respondents was bad in law and there was no proof of the determination of the appellant's contractual tenancy.

Cases referred to:

(1) *Chua Sai Ngoh* v. *Beh Ai Meng* [1955] M.L.J. 167.
(2) *Yong Tong Hong* v. *Siew Soon Wah & Ors.* [1971] 2 M.L.J. 105.
(3) *Doe d. Groves* v. *Groves* (1847) 10 Q.B. 486; 116 E.R. 185.
(4) *Smith* v. *Seghill Overseers* (1875) L.R. 10 Q.B. 422, 429.
(5) *Guan Soon Tin Mining Co.* v. *Ampany Estate Ltd.* [1973] 1 M.L.J. 25,29.
(6) *Doe d. Lyster* v. *Goldwin* (1841) 2 Q.B. 143; 114 E.R. 57.
(7) *London County Council* v. *Agricultural Food Products* [1955] 2 Q.B. 218.
(8) *London County Council* v. *Farren* (1956) 1 W.L.R. 1297.
(9) *Sidebotham* v. *Holland* [1895] 1 Q.B. 378.
(10) *Crate* v. *Miller* [1947] 2 All E.R. 45.

CIVIL APPEAL.

V. Sithambaram for the appellant.
Ariffin Daud for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr.: This is an appeal from the decision of the learned magistrate, Nibong Tebal,